92-250

No. (2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

JASON GRAY,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

MITCHELL S. BRODY
Assistant State's Attorney
Appellate Unit
Office of the Chief State's Attorney
340 Quinnipiac Street
P.O. Box 5000
Wallingford, CT 06492
(203) 265-2373
Counsel of Record
for the Respondent

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QUESTIONS PRESENTED

I. WHETHER THE CONNECTICUT SUPREME COURT ERRONEOUSLY HELD THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE VERDICT BEYOND A REASONABLE DOUBT?

II. WHETHER THE ADMISSION INTO EVIDENCE OF CONSCIOUSNESS OF GUILT TESTIMONY CREATED AN IMPERMISSIBLE BURDEN ON THE PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND SHIFTED THE BURDEN OF PROOF TO THE PETITIONER, IN VIOLATION OF THE PRINCIPLES OF DUE PROCESS?

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CONSTITUTIONAL PROVISIONS AND SUPREME COURT RULES INVOLVED

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of live, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 10
CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed form the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When an state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 221 Conn. 713, 607 A.2d 391 (1992), and is reproduced in the petitioner's appendix at A3-26. The order of the state supreme court denying the petitioner's motion for reargument and reconsideration, dated May 21, 1992, is reprinted in the petitioner's appendix (hereinafter Pet.App.) at A27.

I. STATEMENT OF THE CASE

A jury convicted the petitioner, Jason Gray, of arson in the first degree, in violation of Conn. Gen. Stat. §53a-111 (a) (1).[1] He was sentenced to fifteen years imprisonment, suspended after six years and five years probation. *State v. Gray*, 221 Conn 713, 715, 607 A.2d 391 (1992); Pet. App. at A5.

A. Facts Underlying The Arson Conviction

On July 7, 1989, the petitioner and Calvin Hugins were working under the supervision of Peter Keselewski in the parts department at Ekblade Oldsmobile (hereinafter Ekblade), an automobile dealership. The first floor of the parts department contained a service counter, metal bins, and a desk. On display at the service counter were such high demand items as oil filters and antifreeze. The metal bins contained, *inter alia*, WD-40 and Siloo, diesel fuel antigels. The second floor of the parts department, which could only be reached by a flight of stairs at the rear of the first floor,

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[1] Conn. Gen. Stat. §53a-111 (a) (1) provides in relevant part that "[a] person is guilty of arson in the first degree when, with intent to destroy or damage a building,...he starts a fire... and (1) the building is inhabited or occupied...."

was a five foot by thirty-three foot room, with a plywood floor, a concrete ceiling supported by joists, and rows of storage shelves. Among other things, oil filters and large parts were stored in this area. *Gray*, 221 Conn. at 715-16; Pet. App. at A5-6.

On July 6, 1989, the petitioner informed Hugins that he had noticed a chemical smell emanating from the second floor of the parts department. Hugins was unable to detect any chemical odor, and he told the petitioner to speak to Keselewski. Also on that day, the petitioner informed another Ekblade employee, Marianne McKeon, that he smelled something unusual coming from the second floor. McKeon could not detect anything and urged the defendant to speak with Keselewski. Later, at 4 p.m., Keselewski asked the petitioner to close a window on the second floor. The petitioner did not refer to any unusual odor upon returning from the second floor, and Keselewski did not detect a chemical smell when he closed the parts department. *Gray*, 221 Conn. at 716; Pet. App. at A6.

The next day, July 7, 1989, Hugins opened the parts department at 7 a.m., and the petitioner informed Hugins

at 8 a.m. that he smelled chemicals coming from the second floor. Hugins searched the second floor but did not notice any chemical odors. Between 8:15 and 8:20 a.m., Hugins noticed that the petitioner was restocking the service counter with oil filters that he had obtained from the second floor. Approximately twenty to twenty-five minutes later, Hugins saw smoke coming from the area of the second floor stairs. The petitioner, who had been talking to McKeon, told her that he had to get keys. The petitioner rushed towards his desk in the rear of the floor. McKeon attempted to follow him, but she turned back after being blinded by the smoke. McKeon did not see the petitioner again until sometime between 11 a.m. and 12 p.m., when he stated, "[T]hey think I did it." *Gray*, 221 Conn. at 716-17; Pet. App. at A6-7.

When thirty-five to fifty firefighters arrived on the scene at 8:44 a.m., they noticed flames in the eastern and southeastern corner of the second floor. They were able to subdue the flames by 9:30 a.m. *Gray*, 221 Conn. at 717; Pet. App. at A7.

B. Expert Testimony Pertaining To Petitioner's Sufficiency Of The Evidence Claim

At trial, the respondent presented the testimony of three expert witness: Robert Westervelt, a fire marshal, Joseph Tuscano, an arson inspector, and Jack Hubbell, a chemist in the state forensic laboratory. Westervelt inspected the fire scene on the morning of the fire and Tuscano examined the scene a month later. They concluded that a flammable accelerant had been utilized to start the fire. This conclusion was based upon a "classic pour pattern" that was found on the second floor, extensive charring at the base of the second floor shelves, burn patterns on the walls that did not follow a straight line, and the absence of a heavy glaze on the second floor window panes, all of which were considered to be consistent with ignition by a flammable accelerant. *Gray*, 221 Conn. at 717-18; Pet. App. at A7-8.

Westervelt also took note of the fact that in a light fixture located above and one foot to the north of the point of origin of the fire, the glass portion of a bulb was missing. He rejected the light bulb as the cause of the fire because the wires and connections had remained in tact and there

was no evidence of pitting or melting consistent with temperatures that would give rise to sparking. Furthermore, there was no material in contact with or lying on the floor directly below the fixture. *Gray*, 221 Conn. at 719; Pet. App. at A9.

In addition, Westervelt took samples from the second floor area where the fire originated. These samples were placed into cans, sealed, and taken to the state forensic laboratory. Hubbell subjected floor debris from this area and samples of the diesel antigel Siloo to analysis by a mass spectrometer. The tests revealed that the chemical constituents in the xylenes from the debris and the Siloo were almost a perfect match. *Gray*, 221 Conn. at 719-19; Pet. App. at A8-9.

II. REASONS FOR DENIAL OF THE PETITION

The petitioner raises two issue in his petition. First, he contends that his federal due process rights were violated by the Connecticut Supreme Court's determination that there was sufficient evidence to sustain his conviction for arson in the first degree. Second, the petitioner argues that his fifth amendment privilege against self-incrimination and

his due process rights were violated by the Connecticut Supreme Court's holding that the trial court did not abuse its discretion in failing to strike McKeon's testimony that the petitioner stated after the fire had been brought under control, "[T]hey think I did it."

Neither of these issues warrants certiorari review by this Court. *See* Pet. at i.

A. The Connecticut Supreme Court's Decision That There Was Sufficient Evidence Of Guilt Is A Fact-Bound Determination And, Therefore, Does Not Present A Substantial Federal Question Worthy of Certiorari Review.

The Connecticut Supreme Court upheld the petitioner's conviction for arson in the first degree based upon a review of the evidence that was presented to the jury. The court conducted this review within constitutional boundaries. This court does "not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). Were it to do so, it would be flooded with claims of insufficient evidence.

There is no merit to the petitioner's contention that there was insufficient evidence of two elements of the crime of

arson: that the fire was incendiary in origin and that he was the arsonist. The Connecticut Supreme Court applied well established constitutional principles concerning the standard of "proof beyond a reasonable doubt" in reaching the ultimate conclusion that the testimony of Westervelt, Tuscano, and Hubbell was sufficient to establish the incendiary origin of the fire. *Gray*, 221 Conn. at 720; Pet. App. at A10. In addition, the Connecticut Supreme Court was well within the confines of this Court's precedent when it determined that juries are entitled to draw from conflicting evidence reasonable factual inferences that are consistent with guilt, and are not required to draw only those inferences that are consistent with innocence. *Gray*, 221 Conn. at 721; Pet. App. at A11; *see Jackson v. Virginia*, 413 U.S. 307, 326 (1979) (a reviewing court "must defer" to a trier of facts' resolution of conflicts in the evidence).

As for the petitioner's responsibility for setting the fire, the Connecticut Supreme Court was well within federal constitutional boundaries in finding that there was "proof beyond a reasonable doubt" of identity, based upon evidence that the petitioner had an opportunity to set the fire, that

he had ready access to the type of flammable accelerant that was used to start the fire, that after the fire started he appeared to have an insider's knowledge of the nature and location of the fire, and that he manifested consciousness of guilt both before and after the fire. *Gray*, 221 Conn. at 722-24; Pet. App. at A. 12-14. It is important to point out that the respondent was under no federal constitutional obligation to refute "every hypothesis except that of guilt beyond a reasonable doubt." *Jackson*, 413 U.S. at 325-26.

In sum, the Connecticut Supreme Court was correct in its assessment of the evidence and there is no federal question involved.

B. The Fifth And Fourteenth Amendments To The United States Constitution Were Not Implicated By The Connecticut Supreme Court's Determination That The Trial Court Did Not Abuse Its Discretion In Declining To Strike McKeon's Testimony That The Petitioner Told Her That "They Think I Did It."

The claim regarding McKeon's testimony revolves around the respondent's use of that testimony for purposes of demonstrating that the petitioner was the arsonist. In the view of Connecticut Supreme Court, the jury reasonably could have found that the petitioner had volunteered the

statement to McKeon that "they think I did it," "not because of any urge to respond to innuendo that he was the responsible party but rather out of a consciousness of guilt." *Gray*, 221 Conn. at 725; Pet. App. at A15. The Connecticut Supreme Court also stated that there was no evidence that the authorities had spoken to the petitioner before the statement was made. The petitioner appears to be arguing that the only way he could have responded effectively to this statement was to offer incriminating testimony that the authorities had, indeed, spoken to him and that he was a target of their investigation. *See* Pet. at 22-23.[2] There is no federal constitutional authority for the proposition that the strength of the state's evidence either can create an unconstitutional burden on an accused's privilege against self-incrimination or can shift the burden of proof to the accused, in violation of the principles of due process. *Cf.*

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[2] The petitioner errs in his contention that the respondent's use of McKeon's testimony for purposes of consciousness of guilt impermissibly depended upon a lack of evidence, that is, the absence of any indication in the record that the authorities had spoken to the respondent about the fire prior to the time he told McKeon that "they think I did it." Pet. at 22. Rather, the respondent relied upon evidence that the petitioner made this statement before the fire marshal had determined that the fire was deliberately set. *State v. Gray*, 221 Conn. 713, 724, 607 A.2d 391 (1992). Pet. App. at A14.

United States v. Washington, 431 U.S. 181, 187 (1972) ("The constitution does not prohibit every element which influences a crime suspect to make incriminating statements."). Thus, certiorari review is unwarranted for the defendant's claim because the Connecticut Supreme Court's assessment of the evidence raises no federal questions.

CONCLUSION

The petitioner presents no federal question worthy of review. Therefore, the respondent respectfully urges this Court to deny the petition.

Respectfully submitted.

THE RESPONDENT
STATE OF CONNECTICUT

BY: Mitchell S. Brody

MITCHELL S. BRODY
Assistant State's Attorney
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373
Counsel of Record for the Respondent

September, 1992